The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Celebrating excellence in the legal profession

by Nancy G. Merrill, QC

EACH AND EVERY day, lawyers draw upon their skills and knowledge of the law to serve their clients and their communities. Each of us who is called to the bar has had to demonstrate that we have research and analysis skills, good judgment and creativity, along with some degree of fearlessness and perseverance, to solve legal problems. In order to develop these abilities further, many learn from peers, role models and mentors, join the provincial and local bar associations, or take CPD courses taught by lawyers who are experts in that field of law. It is simply something that we all do.

Then there are the exceptional lawyers among us. The ones who are our role models and mentors. The experts who volunteer to share what they know by teaching CPD courses. The lawyers who are fearless advocates for their clients, while also maintaining a sense of collegiality and professionalism. The lawyers who "show us how it's done."

Exceptional lawyers benefit the public beyond their own clients. The example set by these leaders of the bar helps guide others along their own career path, so that the next generation of lawyers similarly have the skills, courage and compassion that are needed in an honourable profession that protects the public interest.

Earlier this year, I launched something that I call "Unsung Heroes," which celebrates some of the exceptional lawyers who toil away quietly, and whose leadership and example are known only to a small few. When I hear their stories, I am inspired by how they touch lives and make a true difference. I do not wish for their hard work and dedication to go unnoticed. I decided to recognize them by sharing their stories, which I hope will inspire you, too. The first "Unsung Heroes" entry features esteemed legal aid lawyer Bob Bellows. His story can be read in my blog post here.

This fall, the Law Society will recognize exceptional lawyers for their contributions in several areas of law and to the legal profession. Nominations are now open for the Law Society Equity, Diversity and Inclusion Award; the Excellence in Family Law Award; the Award for Leadership in Legal Aid; and the newly established Pro Bono Award. These awards recognize people for their excellent work and thank them for their strong commitment to the betterment of both the profession and the public. If you know of a deserving lawyer, I strongly encourage you to visit our website and submit a nomination.

I know that many more lawyers in our province deserve praise and recognition for the work they do, but for now, I want to thank you all, for your role in the administration of justice and for continuing to set a high calibre of professionalism in the legal profession.❖

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work, and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions for improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost.

Issues of the *Bulletin* are published online at www.lawsociety.bc.ca (see About Us > News and Publications).

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A busy fall agenda

by Don Avison

SEPTEMBER IS A busy time at the Law Society. I would like to share a few of the things we have been preparing for this summer, as we tackle a busy agenda in the coming months.

First up is the 2019 annual general meeting, the first to be conducted under revised rules. While the meeting itself will be held on October 2, members will be able to vote on resolutions in advance online between September 17 and October 1. The meeting will be viewable online, and those who wish to attend the meeting in person will still be able to vote on resolutions if they have not already done so. Details of the new AGM procedures are available in the August 1 Notice to the Profession. Resolutions will be available in a second Notice to the Profession, scheduled to be distributed and posted online on September 13.

A Bencher election is also fast approaching, with nominations closing on October 15. This is an opportunity to have your say on who will set rules for governing the legal profession in the public interest. It is also an opportunity to consider nominating a colleague or accepting a nomination. Those considering running for election are encouraged to watch short videos, which offer perspectives on what it means to be a Bencher.

Fall is also awards season. This year, the Law Society has introduced a new award to recognize those who have demonstrated exceptional commitment to the provision of pro bono services in British Columbia. The Pro Bono Award joins our existing awards, which recognize excellence in family law, leadership in legal aid and significant contributions to equity, diversity and inclusion. Nominations for these awards close on October 4, and the awards will be presented at a recognition dinner on December 6. Find out more about award criteria and download nomination forms on our website.

Also this fall, the Law Society is continuing its efforts to advocate for improvements to legal aid. Several meetings with elected officials have already taken place over the past months, and in October the Law Society is organizing a Day@ the Legislature for the president and Benchers to meet with ministers and members of the legislative assembly, to further voice our support for improved funding and also address other issues.

Add to all of this the Law Society's engagement with a number of initiatives to advance our strategic priorities through events and in partnership with others. Watch for an important announcement about intercultural competence training on Orange Shirt Day on September 30. Work is underway to support those marking Access to Justice Week and Multiculturalism Week in October and November.

Finally, with the Cullen Commission of Inquiry into Money Laundering in British Columbia in its preliminary stages, the Law Society is preparing what is required to support the inquiry with the information it needs on the role of the Law Society, our trust audit process and other initiatives we have undertaken to protect the public interest.

We have a busy agenda this fall, and I encourage all lawyers to take part by voting online or in person on AGM resolutions, by participating in the Bencher election and by nominating candidates deserving recognition for excellence in the profession.❖

Nominations open for four Law Society awards

The Law Society is inviting nominations and applications for four awards recognizing excellence in the legal profession: the Law Society Excellence in Family Law Award; the Award for Leadership in Legal Aid; the Equity, Diversity and Inclusion Award; and the newly established Pro Bono Award.

The nomination deadline for all four awards is October 4, 2019. For award criteria and nomination instructions, visit the Law Society's Awards and Scholarships web page.

New this year: Pro Bono Award

The Law Society will award its first Pro Bono Award in December this year. The award recognizes lawyers who have demonstrated exceptional commitment to the provision of pro bono services in British Columbia. The Pro Bono Award was approved in May this year, and criteria were formalized at the July Benchers meeting.

In brief

LAW SOCIETY FALL CALENDAR

October 2	Annual general meeting
November 6	Bench & Bar Dinner
November 15	Bencher election – vote count

JUDICIAL APPOINTMENTS

Alan M. Ross, a partner at Alexander Holburn Beaudin + Lang LLP in Vancouver, was appointed a judge of the Supreme Court of BC. He replaces Mr. Justice Robert J. Sewell, who elected to become a supernumerary judge effective January 22, 2019.

Sheila Tucker, QC, counsel at Shapray Cramer Fitterman Lamer LLP in Vancouver, was appointed a judge of the Supreme Court of BC. She replaces Madam Justice Brenda J. Brown, who elected to become a supernumerary judge effective February 19, 2019.

David A. Crerar, a partner at Borden Ladner Gervais LLP in Vancouver, was appointed a judge of the Supreme Court of BC. He replaces Mr. Justice Patrice Abrioux, who was elevated to the Court of Appeal on March 7, 2019.

David Patterson, legal agent for the Public Prosecution Service of Canada in the Fraser region, was appointed a judge of the Provincial Court in the Northern region with chambers in Prince Rupert.

Jennifer Keim, general counsel, director of legal services and information management and corporate secretary for the British Columbia Lottery Corporation, was appointed a master of the Supreme Court of BC in Kamloops.

2019 annual general meeting

THE LAW SOCIETY'S 2019 annual general meeting is scheduled for Wednesday, October 2, 2019. Business of the meeting will include the election of the second vice-president and appointment of the Law Society auditor, as well as consideration of any members' resolutions received by the August deadline.

Pursuant to the results of the 2019 referendum and ensuing amendments to the Law Society Rules, advance online voting on all resolutions will be open from Tuesday, September 17, to 5:00 pm on Tuesday, October 1, 2019. Those members who did not already vote online during the advance voting period may still vote on resolutions in person at the main AGM location in Vancouver and at each of the audio-conference locations.

Further information about the Law Society's new AGM procedure and timeline is available on the Law Society website.❖

Nominations for upcoming Bencher election

A BENCHER ELECTION is being held this November, with electronic voting beginning on November 1 and continuing until November 14. BC lawyers will have the opportunity to elect Benchers in all districts for a term that begins January 1, 2020 and continues until December 31, 2021.

Lawyers in good standing with the Law Society are eligible to be candidates. Nominations are open from now until 5:00 pm on Tuesday, October 15, 2019.

As part of their responsibility to govern in the public interest and oversee the administration of the Law Society, Benchers set and enforce professional standards for lawyers, sit on panels for discipline and credentials hearings and are members on a number of Law Society committees, working groups and task forces. Benchers can expect their formal duties to take up approximately four or five full days a month, with a considerable amount of time spent on preparing for and attending meetings and hearing panels.

The Law Society has created a video series featuring some current Benchers who are not up for re-election speaking about their experiences. Candidates and those considering becoming a candidate can hear about Benchers' personal experiences, what the Law Society and Benchers do, what it means to be a Bencher and what to expect once elected. Visit the Bencher Elections web page to see the videos.

The Law Society is committed to equity, diversity and inclusion in a legal profession that reflects the diversity of British Columbia's public. To hear more about this from President Nancy Merrill, QC, watch our video.

For nomination details, visit our website.❖

ORANGE SHIRT DAY

Reflecting on truth and reconciliation

ORANGE SHIRT DAY takes place on September 30 and is a day to reflect on the legacy of residential schools and learn from stories of Indigenous children who were taken from their parents and sent to residential schools.

First observed in 2013, Orange Shirt Day was inspired by the story of Phyllis Webstad, who, at six years old, had her orange shirt taken away when she first arrived at residential school in 1973. The Orange Shirt Society welcomes organizations to participate in events or coordinate their own, and the Law Society will be raising awareness and continuing the conversation on the legacy of residential schools through several internal initiatives.

The Law Society's participation in Orange Shirt Day further indicates its commitment to moving toward reconciliation. The Law Society's Truth and Reconciliation Action Plan, which proposes more than 50 actions to unfold over the years to come, is well underway with over 30 initiatives already implemented. A crucial element of the action plan is education, in order to improve the understanding of the detrimental impact of colonial laws on Indigenous peoples. As a result, the Professional Legal Training Course has seen the addition of sessions dedicated to Indigenous intercultural competence over the past year.

The Law Society encourages everyone in the legal profession to consider ways to get involved in Orange Shirt Day. More information on how you can participate can be found here.❖

Rule of Law Lecture presentations available online

On June 25, the Law Society hosted the third annual Rule of Law Lecture, where an audience of more than 225 people were treated to speeches about privacy, technology and the rule of law by the Right Honourable Beverley McLachlin, PC, CC, former chief justice of Canada, and Vancouver criminal lawyer and Life Bencher Richard Peck, QC.

McLachlin, noting that all lawyers pay tribute to the lofty concept of the rule of law, took the audience through some of the real-life threats to the rule of law across the world and what they mean to citizens. Pointing to the recent protests in Hong Kong, and to countries such as Russia, where "the slide away from the rule of law is so subtle that few turn out to protest the decline," she stated that "central as the rule of law is to our existence, we are beginning to understand that it can be weakened and lost."

Peck framed his remarks by referencing that the event was taking place on the 70th anniversary of Orwell's *Nineteen Eighty-Four*, the dystopian novel that foretold a state that could listen in on citizens. Tracing the history of privacy's protection in law from 17th-century England through American jurisprudence to a 1984 Supreme Court of Canada decision, he went on to warn that these protections are under threat when he said, "The fundamental problem is that the law has not kept pace with the development of technology." Peck pointed to examples such as the disembodied voice emanating from "talking cameras" in England, which might identify a passerby with unnerving detail, and order the individual to place her litter in the trash bin.

"In the digital age, our right to be left alone is silently depleting to a point of no return," Peck warned the audience.

The Law Society launched the annual Rule of Law Lecture Series in 2017 to increase public awareness about the importance of the rule of law. A video of the 2019 lecture is available on YouTube. Transcripts of the speeches by McLachlin and Peck can be downloaded from our website.❖

Richard Peck, QC and the Right Honourable Beverley McLachlin, PC, CC.

Law Society submission on provincial budget

THE LAW SOCIETY appeared in front of the provincial government's Select Standing Committee on Finance and Government Services for the 2020 provincial budget consultation. Submissions were made by Elizabeth Rowbotham, Bencher from Vancouver County, and focused on improving the availability of legal aid and ensuring adequate resources for attracting and retaining lawyers who take legal aid cases. The Hansard transcript of the submission is featured below.

Elizabeth Rowbotham: Thank you, Mr. Chair, members of the committee. We appreciate the opportunity to speak with you today. We'd also like to thank the Esquimalt and Songhees First Nations for hosting these consultations on their territorial lands.

My name is Elizabeth Rowbotham. I'm an elected Bencher with the Law Society of British Columbia. I'm here today in that capacity. I am also a lawyer with the Legal Services Branch, Ministry of Attorney General. I do not advise the province on any aspect of budget development, and I'm here solely in my capacity as a Bencher with the Law Society.

As you may know, the Benchers, as a term, refers to the governing board of the Law Society. It is the Law Society which regulates the legal profession in the province of British Columbia. In addition to elected Benchers such as myself, the Benchers also include representatives of the public, who are selected and appointed by the government to the Law Society. The Law Society is distinct from the Canadian Bar Association, from whom you have just heard, which is a voluntary association for lawyers.

The *Legal Profession Act* sets out the Law Society's regulatory mandate and provides that the Law Society's core role and functions include the protection of consumers of legal services, upholding public confidence in the administration of justice and protecting the rights and freedoms of all persons.

Today there are three main areas that I'd like to speak to you about. These are money laundering, the Truth and Reconciliation Commission calls to action and legal aid.

With respect to money laundering, the Law Society enforces stringent rules to ensure that lawyers do not facilitate money laundering. If there is evidence that a lawyer may have breached these rules, the Law Society has the resources and the expertise to take disciplinary action. The Law Society's investigation enforcement team includes 15 auditors; four forensic accountants; two forensic analysts; a former senior RCMP investigator who has experience in criminal proceeds of crime investigations; and [discipline, monitoring and enforcement counsel] who have experience with money laundering matters.

As Dr. German recently noted in his second report on dirty money, the Law Society of BC is recognized as a best practice amongst Canadian law societies with regard to anti-money laundering initiatives. The Law Society welcomed the *Land Owner Transparency Act* and the amendments to the British Columbia *[Business] Corporations Act*. These important measures will provide information that will assist money laundering investigations by the Law Society and by others.

Finally, the Law Society supports a provincially appointed Commission of Inquiry into Money Laundering. We'd like to recommend that the inquiry be informed of the initiatives and actions taken by the Law Society and by others and that the inquiry make recommendations about what further steps may be taken to address money laundering.

Last year, in the Law Society submissions to this committee, Dean Lawton, QC spoke about the Law Society's commitment to advancing the two calls to action that were directed towards the Law Society and law schools in the Truth and Reconciliation Commission report. In that regard, the Law Society has established a permanent standing committee to advise it. This committee is composed of Indigenous lawyers, Benchers and community leaders. The Law Society is currently reviewing the recently released National Inquiry into Missing and Murdered Indigenous Women and Girls report and the call for justice directed to the law societies in that report.

Elizabeth Rowbotham

It is the Law Society's request and recommendation that the next provincial budget include allocations for expanding restorative justice programs and for training writers in Gladue reports. Regarding legal aid, the Law Society's vision is that all British Columbians, regardless of their means, deserve access to legal advice and representation. Like the CBA, we recognize and welcome the new investments that were made in Budget 2019 as well as the interim funding that has been provided to avert a service withdrawal by lawyers who provide legal aid services.

We welcome these announcements. They represent an important shift in how government is approaching legal aid. However, as the CBA identified, a significant gap remains in what is needed to fund legal aid services, not only for criminal law cases, but also for women, Indigenous people and persons with mental health and substance use issues. For instance, it has reached a point where 50 per cent of women who meet the eligibility requirements for legal aid for family law are unable to get help because the funding has run out. For those 50 per cent that could get funding, the funding again runs out before they are able to resolve their problems.

The Law Society respectfully recommends that Budget 2020 allocate funding and resources to enable the Legal Services Society to increase the tariff rate to levels necessary to extend access and to attract and retain legal counsel. The Law Society is committed to working with the provincial government and all members of the legislative assembly to collaborate on these and other initiatives that make positive changes in our communities.

Subject to any questions the committee may have, those are our submissions. Thank you.❖

Unauthorized practice of law

THE LAW SOCIETY acts to protect the public against individuals who hold themselves out to be lawyers when they are not.

From January 30 to August 1, 2019, the Law Society obtained written commitments from six individuals and businesses to stop engaging in unauthorized practice of law. If they break their promise, the Law Society may obtain a court order against them. These individuals and businesses put the public at risk by performing unregulated and uninsured legal services or misrepresenting themselves as lawyers.

During that time period, the Law Society also obtained one order prohibiting an individual from engaging in the unauthorized practice of law.

Mahmood Somani, aka **Moe Somani**, consented to an order prohibiting him from engaging in the practice of law for a fee, from commencing, prosecuting or defending a proceeding on behalf of another and from representing himself as a lawyer or using any other title that connotes that he is qualified or entitled to practise law. The Law Society alleged that Somani engaged in the unauthorized practice of law by providing legal advice and offering to prepare court documents for a fee. Somani neither directly confirmed nor denied these allegations but nonetheless signed a consent order dated June 28, 2019.

To read the order, search by name in the Law Society's database of unauthorized practitioners.❖

FROM THE LAW FOUNDATION OF BC

New executive director: Josh Paterson

THE LAW FOUNDATION of BC is happy to announce that **Josh Paterson** is the new executive director of the Law Foundation beginning September 3, 2019.

Josh was the executive director of the BC Civil Liberties Association since January 2013. Under his leadership, the BCCLA's legal challenges and law reform work created substantial change in Canadian law — from winning the right to medical assistance in dying to the victory overturning solitary confinement in Canada's prisons. The BCCLA also modernized its governance structure, developed its first strategic plan and significantly increased its financial capacity during Josh's tenure.

Josh has worked for several legal organizations and a litigation firm, practising constitutional, First Nations, labour, human rights and environmental law. He has served on a number of government advisory bodies, including BC's Advisory Committee on Provincial Policing Standards, the BC Police Academy Recruit Curriculum Evaluation Steering Committee, and the National Energy Board's Land Matters Group.

Josh has taught as an adjunct professor of law at the Peter A. Allard School of Law at the University of British Columbia for six years. He holds law and master's degrees from the University of Toronto and clerked at Ontario's Superior Court of Justice.

2020-2021 LAW FOUNDATION GRADUATE FELLOWSHIPS

The Law Foundation will issue up to six Graduate Fellowship awards of up to $15,000 for the 2020-2021 academic year.

Applicants must be one of the following:

- a graduate of a British Columbia law school;
- a member of the British Columbia bar;
- currently attending, or to be attending at the time of their fellowship, a graduate program at UBC or University of Victoria law school (with the exception of a graduate program whose purpose is to provide National Committee on Accreditation equivalency to practise law in Canada);
- a resident of British Columbia.

Applicants must devote themselves primarily to their full-time graduate studies in law or a law-related area. (Current recipients of a Legal Research Fund grant from the Foundation are not eligible for Graduate Fellowships.)

Recipients whose program of study extends beyond one year may apply for a second fellowship in the next year's competition. An award of a fellowship for the first year of study does not constitute a commitment for further funding.

Applications will be assessed by the Fellowships and Research Committee composed of a minimum of three governors of the Law Foundation and one representative from each of the law faculties of Thompson Rivers University, the University of Victoria and the University of British Columbia. In assessing applications, the committee will consider not only a candidate's academic achievements, but also the likelihood of furtherance of the objectives of the Law Foundation and the possible benefits to the public of British Columbia from making an award to a candidate.

All applications and supporting material must be received at the Law Foundation office by **January 3, 2020.** For details about the fellowships and the application process please refer to the Law Foundation website.❖

Rule of law essay contest

Brian Dennehy Photography

Law Society President Nancy Merrill, QC congratulates essay contest winners Vivian Osiek and Bret J. Van Den Brink for their exceptional essays on the rule of law

IN 2015, THE Law Society launched its annual essay contest for BC secondary school students. The intention of the contest is to reaffirm the significance of the rule of law and to enhance students' knowledge of and willingness to participate actively in civic life.

The topic for the 2018-2019 contest was:

How would you explain the concept of the rule of law to a new classmate who recently arrived in Canada? Please provide examples of its application to our daily lives, which may include a discussion of any current challenges or threats to the rule of law.

The Law Society congratulates contest winners Vivian Osiek, a recent graduate from Windsor Secondary School in North Vancouver, and Bret J. Van Den Brink, a recent graduate from Unity Christian School in Chilliwack.

We are pleased to publish their essays in this issue of the *Benchers' Bulletin*.

Canada and the Rule of Law

Grounded in its principles, Canadian society thrives.

by Vivian Osiek, grade 12 student, Windsor Secondary School
Co-winner of the 2018-2019 rule of law essay contest

April 17th, 1982 marked a significant milestone for the Canadian people. The 1867 *British North America Act*, also known as the *Constitution Act, 1867*, had established Canada as a self-governing confederation through the union of four British colonies, but its Constitution could only be amended by the British government (McCullough, n.d., History of the Canadian Constitution, para. 2). On April 17th, 1982, Britain passed the *Canada Act*, or the *Constitution Act, 1982*. This patriated the Constitution,

officially relieving Britain of its power to legislate for Canada, giving Canada, in essence, legal and political independence from Britain (McCullough, n.d., History of The Canadian Constitution, para. 3). The Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, ensures that no law infringes on Canadians' various fundamental rights, for example, freedom of religion, freedom of peaceful assembly, and freedom of expression (Canadian Charter of Rights and Freedoms, 1982, s 2). Recognizing the importance of the Rule of Law in Canadian society, the Charter opens with, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law" (Canadian Charter of Rights and Freedoms, 1982, pmbl.). To a newcomer to Canada, one could explain the Rule of Law to be a legal concept affirming that the law applies equally to all citizens, that no person or institution, regardless of rank, is above the law; all are equally accountable and subject to it. Part of this is the idea that power must not be used by the government arbitrarily; the government must rule in accordance with established laws and be limited by their constraints (Choi, n.d., Introduction section, para. 1). The Rule of Law is shown to be an underlying, essential concept, intended to shape Canadian society and the way it is governed. With a historical foundation dating back hundreds of years (Choi, n.d., Introduction section, para. 2), it has immeasurable value in the lives of Canadians, protecting their freedom and encouraging diversity.

While the Rule of Law is a major element of modern-day Canadian democracy, it has existed as a concept since antiquity. Greek philosopher Aristotle makes the argument that it is more beneficial for a society to be ruled by laws rather than simply based on individuals' judgment ("The Rule of Law," 2016, History of the Rule of Law, Aristotle, para. 1). In his *Politics*, he writes, "the rule of the law … is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law" (Aristotle, 2001/350 BCE, p. 1202), the idea that those who enforce the law serve the purpose of guarding it, being granted authority but not absolution from the law's demands, regulations, consequences and obligations. Centuries later, this idea was expanded upon by John Locke, who emphasized the need for laws to be firmly put in place, as opposed to governments' decisions being made simply arbitrarily, at the whim of those in control ("The Rule of Law," 2016, History of the Rule of Law, John Locke, para. 1). Others, such as philosopher Montesquieu ("The Rule of Law," 2016, History of the Rule of Law, Montesquieu, para. 1) and constitutional theorist Albert Venn Dicey also contributed to the concept's development. Dicey especially highlighted legal equality as indispensable when it comes to the Rule of Law, writing, about the Rule of Law in England, "not only that … no man is above the law, but … that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals" (Dicey, 1960/1885, p. 193). In this vein, the justice system is recognized as playing a critical role in upholding citizens' equality under the law, regardless of social status or influence. The historical basis for the Rule of Law establishes it as an integral pillar of any democracy, influencing politics and law in modern societies such as Canada.

Because of the importance of the Rule of Law and the necessity for protection of fundamental rights to be included within the law itself, education about laws and government as well as each individual's rights is absolutely essential. One of the characteristics of the Rule of Law is that of Just Laws, being that "[t]he laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights" ("What is the Rule of Law?" n.d., Just Laws, para. 1).

However, it is not enough that such principles be established or even documented. In order to ensure transparency and fairness when it comes to the way that laws are enacted, the population must be educated so that they are able to advocate for themselves and their rights should the need arise. Education, specifically education about the institutions that govern and regulate society, is a direct manifestation of the Rule of Law in Canadians' daily lives. Education ensures accountability under the law for all institutions, public and private. It gives citizens the tools to protect themselves from violations of their rights, and it forms the front line of defence in a free and equal society. A lack of education threatens the Rule of Law. It shifts the balance of power away from the people and fairly enacted laws and can open the door to corruption and oppression. In order to prevent such things from happening, in Canada, the younger generation has the right to a public education ("Right to Education," n.d., para. 2). Students are taught about the components of Canada's democracy, its governmental systems including the judicial system, and their rights as Canadians. In British Columbia, for example, these elements are part of the provincial social studies curriculum ("Social Studies," n.d., Introduction, para. 5). Another way the public is empowered through education is through justice education organizations, usually provincially based, such as the Ontario Justice Education Network, the Justice Etducation Society of British Columbia, and the Public Legal Education and Information Service of New Brunswick, among many others ("Public Legal Information and Education in Canada," n.d.).

These organizations provide resources, programs, and workshops to the public ("OJEN in the Community," n.d., para. 2), "informing them about the law and the legal system" ("Public Legal Information and Education in Canada," n.d., para. 1). Through education for children and youth and for the general public, the precedence of the Rule of Law and therefore Canada's democracy are strengthened, protecting the rights and freedoms of Canadians.

The value of the Rule of Law in Canada is even more apparent when Canada's increasingly diverse population is considered. Canada is especially notable in

ethnocultural diversity. In Canada, more than 200 languages are spoken ("Linguistic Characteristics of Canadians," 2018, Linguistic Diversity, para. 1) and over six religious faiths are practiced. With regards to ethnic origin, over 200 ethnicities are represented within the population ("Immigration and Ethnocultural Diversity in Canada," 2018, Ethnic Ancestry, para. 1). The proportion of Canadian citizens and permanent residents born outside of Canada exceeds 20% ("Immigration and Ethnocultural Diversity in Canada," 2018, Immigration, para. 1). But these distinctions are not necessarily divisive. The Rule of Law makes it so that all of Canada's residents can stand united, on equal footing. As all Canadians are equal under the law, they have a shared responsibility to obey the law in order to keep themselves and their communities safe. While it promotes unity between different people, the law also safeguards these differences themselves, allowing them to be highlighted and embraced, creating a welcoming environment for newcomers. According to the Canadian Charter of Rights and Freedoms, equality is a fundamental right ("The Rights and Freedoms the Charter Protects," 2018, Equality Rights, para. 1). This means that no matter their race, national or ethnic origin, colour, religion, sex, age, ability, sexual orientation, residency, marital status or citizenship, every person has the right to be treated with respect, not to have to face discrimination. The Rule of Law allows Canadian society to be aware of acts of intolerance and gives a fair means of punishing them, thereby ensuring harmony and diversity. As inclusion, multiculturalism, and equality are valued, so must the Rule of Law be valued, and vice versa.

When the Rule of Law is respected and upheld, the people governed by defined laws rather than the variable inclinations and whims of their leaders, their fundamental rights are protected and diversity is allowed to flourish.

To be ruled by the law means to be free from the instability and oppression of absolute power. To be equal under the law means to have the liberty to be an individual without fear of discrimination or arbitrary punishment. The Rule of Law, for hundreds of years, has provided the basis for a democratic society where the government serves the people rather than the people serving the government, as leaders and politicians work to enforce and democratically enact laws, not supersede them. A society ruled by law is equipped to protect human beings' fundamental rights, deal justly with crime, and limit power so that all can be accountable and treated with the respect and dignity that they deserve ("The Rule of Law," 2016, One Ideal Among the Others, para. 1; The Contestedness of the Rule of Law, para. 1). Canada is fortunate to uphold the Rule of Law in its institutions, educating the public to ensure that the values upon which the nation was founded continue to guide how it is governed, as its population grows more vibrant and more diverse.

To read the list of works cited, download the PDF.

Equality, Order and the Rule of Law

by Bret J. Van Den Brink, grade 12 student, Unity Christian School
Co-winner of the 2018-2019 rule of law essay contest

Democracy is the rule of the people, and its very nature mandates that all people are equal before that which rules. That then raises the question: What is it that rules? It cannot be any single person, for if anyone reigns with unchecked power, the rule ceases to be democratic, and becomes a dictatorship. Then what rules? The law itself. As Samuel Rutherford titled his book on the subject, *Lex, Rex*: the law is king. That is the fundamental principle behind the Rule of Law, from which two secondary principles can be derived: all individuals are equal before the law, and the preservation and maintenance of the law allows for the existence of order in human society. In recent months, however, there have been two major news stories involving the Rule of Law that have been shaking Canadian media: the Huawei extradition case and the SNC-Lavalin affair.

Lady Justice is blindfolded — that is the first principle one must derive from the Rule of Law. Each person, the private individual and government official alike, is subject to the law. In his essay "Of Judicature," Sir Francis Bacon has given one of the most lucid images for the understanding of this principle. Bacon wrote that judges work at "raising valleys, and taking down hills … to make inequality equal; that he may plant his judgement as upon an even ground" (Bacon 176). That is exactly what they do, and that is the function that the Rule of Law serves.

The second principle to be derived from the Rule of Law is less intuitive than the first, but is just as essential. In response to a reference question regarding the *Manitoba Act*, the Supreme Court found that "the Rule of Law requires the creation and maintenance of an actual

order of positive laws which preserves and embodies the more general principle of normative order" (Re Manitoba Language Rights, [1985] 1 S.C.R. 721). That is to say, the Rule of Law requires the existence of laws which people then follow, preserving order in society, in avoidance of anarchy and its many conflicts. Paradoxically, this reasonable restriction of individual liberties then allows people to live their lives more freely, by restricting the disorders of the world around them. Thanks to the Rule of Law, one can walk the streets of Canada without fear.

In recent months, there has been a spectre casting its shadow over Canadian politics: the SNC-Lavalin affair. The former justice minister, Jody Wilson-Raybould, has claimed that the prime minister and his cabinet have attempted to assert influence over her, so that the Montreal-based company — SNC-Lavalin — would be given a deferred prosecution agreement, instead of facing a trial and potential criminal conviction. The inherent gravity of such claims is catastrophic, for if proven true, they undermine the judicial independence of our country by infringing on the judiciary's ability to decide the case according to their own discretion. If this has indeed occurred, the prime minister's intervention would upset the Rule of Law with its preferential treatment of SNC-Lavalin, simply for the fact that the company is beneficial for the Canadian economy. Despite possible government interference, the courts have been following the due process for this case, and Canada's director of public prosecutions has made the "preliminary decision not to negotiate a special plea agreement on the criminal charges" (Bronskill, *CBC News*). Any potential crisis of the Rule of Law, in this case, has been averted, but that is not to say that the crisis never existed at all.

The second major event of 2019, regarding the Rule of Law, is the case for the extradition of Meng Wanzhou, the chief financial officer of the Chinese technology giant Huawei. In the United States, Wanzhou is wanted on fraud charges, and they have requested her extradition from Canada. She was arrested by Canada last year on the first of December and is currently under house arrest. Her case is remarkably demonstrative of the Rule of Law, as it is vital for understanding the proceeding events in the three countries involved: Canada, the United States, and China.

In this case, Canada is following the Rule of Law immaculately. Despite her wealth and influence, she is going through the due process and is scheduled to have an appearance in the Supreme Court of British Columbia on the sixth of March "to confirm that an Authority to Proceed has been issued and to schedule the date for the extradition hearing" (Department of Justice Canada). The next step is for the courts to determine "whether the fraud accusations against Ms. Meng by the United States constitutes a crime in Canada" (Bilefsky, *The New York Times*). Once that is finished, Canada will act accordingly.

Though Canada is following the due process for the case, there are concerns that the United States might not adhere to it so strongly if Wanzhou is extradited there. The American president, Donald Trump, has been under scrutiny for a remark that he had made to Reuters regarding the extradition. He said that "if I think it's good for what will be certainly the largest trade deal ever made … I would certainly intervene if I thought it was necessary" (Mason, Reuters). His statement is concerning for a myriad of reasons. First, it threatens America's judicial independence. Second, it diminishes the Rule of Law's principle of equality before the law, by giving Wanzhou special treatment for the potential economic gain of America. Third, it threatens the Rule of Law's other principle of order. If Huawei and Wanzhou are guilty, and she is set free, then that will allow for further disorder and conflict from Huawei.

For this case, in Canada, the Rule of Law is being upheld, in America, it is threatened, and in China, it is nearly absent. In an article, the researcher Emi Mifune wrote that "China has been faced with metamorphosing from the system of 'renzhi' (ruled by men) to the system of fazhi (ruled by law)" (Mifune). Note that fazhi is translated as "ruled by law" not "Rule of Law"; the difference in wording is minuscule, but the difference in meaning is substantial. "Ruled by law" lacks the values — such as the protection of rights and freedoms, and to orderly society — implied by the Rule of Law. In addition to this is the fact that the Chinese courts are not independent from the Chinese government. This is important because shortly after Canada's arrest of Wanzhou, the Chinese courts sentenced the Canadian — Robert Schellenberg — to death for a drug-related crime. It was reported that Schellenberg was "writing his own letter to ask a higher court to examine his case" (Vanderklippe, *The Globe and Mail*). This, in turn, caused Global Affairs Canada to release a notice encouraging Canadians to "exercise a high degree of caution in China due to the risk of arbitrary enforcement of local laws" (Global Affairs Canada). It is believed that these enforcements are China's retaliation for the Wanzhou arrest. This is made possible because "some of the internal 'renzhi' systems still remain unchanged" (Mifune). These scenarios are the things risked when the Rule of Law is not adhered to: the arbitrary enforcement of laws, the sense of disorder and peril, and even — as an extremity — death.

The Rule of Law is what keeps us safe. It makes individuals equal before the law, and it shapes the laws in such a way as to be useful and good. It is the principle that brings order to our country and to our lives. Our country's adherence to it is the source of our rights and freedoms, and our rights and freedoms are the very things at risk when it is abandoned. It is our nation's duty to maintain it at whatever cost, for next to it everything else diminishes in importance.

To read the list of works cited, download the PDF.

Combatting money laundering

PUBLIC AWARENESS OF money laundering has increased in recent years, as a result of media reports and independent reviews by retired RCMP deputy commissioner Dr. Peter German, QC and an expert panel led by SFU professor and former deputy attorney general Maureen Maloney, QC. Following the release of these reports, the provincial government announced a public inquiry into money laundering, appointing BC Supreme Court Justice Austin Cullen to head the inquiry. The scope of the inquiry will include real estate, gaming, and financial and professional services sectors. Justice Cullen has also been asked to examine the role of regulatory authorities, including any barriers to effective law enforcement in relation to money laundering activities.

The inquiry will begin holding hearings early next year, and it is scheduled to deliver its final report by May 2021.

RECOGNIZING MONEY LAUNDERING

The Law Society has been engaged in developing stringent anti-money laundering measures for some time. In 2004, the Benchers adopted a rule limiting the amount a lawyer may receive in cash from any one client, which was followed by new client identification and verification rules. Lawyer education and practice advice supports have been implemented. The Law Society has also added resources for proactive monitoring and audits of law firm trust accounts to help lawyers identify and manage risks.

It is not necessarily easy to spot money laundering. Tsur Somerville, a member of Maloney's expert panel, noted in a media interview following the release of the Maloney report that "The nature of money laundering is that there isn't a flag that says, 'This is a money laundering house.' Everything that you might associate with money laundering can also be legitimate. The fact that someone who lists their

occupation as 'student' owns five houses, they are essentially the vehicle for their family because they are the one living here, doesn't necessarily make it illegal."

In his report, German describes three stages of money laundering. In the initial "wash cycle," proceeds of crime, or funds intended to support illegal activity, are introduced into the financial system via a financial vehicle such as a bank deposit, or multiple deposits at more than one institution. In the "spin cycle," the funds are distanced from their illegal source as they are transferred through multiple layers of often complex financial transactions. Finally, in the "dry cycle," the money is reintegrated into the legitimate economy through transactions that can be as simple as a wire transfer, or as complex as the creation of shell companies and fraudulent accounting.

Lawyers are the gatekeepers of trust accounts that are used every day for thousands of legitimate transactions, but they can also be the target of sophisticated criminals looking to filter funds through transactions that make it appear as though the funds came from legitimate activities.

The German and Maloney reports describe a number of legitimate, legal instruments that are manipulated by criminals to launder money, including numbered companies, bare trusts, and nominees who may be used to disguise the true owners of real property. In an appendix to the Maloney report, Somerville points out that organized crime favours these tools precisely because they are a legitimate part of everyday business. He notes that a money launderer may hide behind a numbered company, "yet it is more typical than not for a developer to establish separate stand-alone companies, often numbered companies, to hold land purchased for future developments."

The Maloney report's first recommendation calls for a "beneficial ownership registry for all legal persons and entities," to which the provincial government responded quickly by creating such a registry for land, in the *Land Owner Transparency Act* adopted earlier this year. For its part, the Law Society recommended this measure in a 2018 submission to Attorney General David Eby, QC and supports the establishment of such a registry as a way to aid the Law Society, other regulators and law enforcement agencies with information that can assist investigations into money laundering.

THE ROLE OF THE LAW SOCIETY

Money laundering affects every aspect of our society and its institutions, including financial institutions, law enforcement agencies and professional regulators. No single agency on its own has the resources to effectively combat it.

In his report, Dr. German noted that at the time of the report there were no federally funded RCMP resources in BC dedicated to criminal money laundering investigations, and that resources for police in the province are equally lacking. It has also become clear that the federal database of suspicious financial transactions established by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* is not, in itself, sufficient to deter money laundering. The Financial Transactions and Reports Analysis Centre of Canada received 9.5 million reports of suspicious transactions in 2018, and just 1,708 of those, or 0.02 per cent, were referred to law enforcement for investigation.

As regulator of the legal profession, the Law Society has an integral role in the broader anti-money laundering regime and in supporting the work of the public inquiry. Lawyers are the gatekeepers of trust accounts that are used every day for thousands of legitimate transactions, but they can also be the target of sophisticated criminals looking to filter funds through transactions that make it appear as though the funds came from legitimate activities.

CONCLUSION

Money laundering is not a victimless crime; it enables criminal activity in all walks of life and affects all Canadians. As a regulator, the Law Society has a role in ensuring an environment that makes lawyers less vulnerable to organized criminals who are looking to exploit legal tools to launder money. Recent measures announced by the provincial and federal governments are a welcome development, and the Law Society looks forward to the findings and recommendations of the provincial public inquiry. However, we cannot be complacent. Criminals will continue to seek ways to filter their funds through Canada's financial system. Lawyers, like all law-abiding Canadians, must constantly be vigilant and seek ways to ensure they are not complicit.❖

What is the Vancouver model?

The forms of money laundering are ever evolving, but here in BC many were surprised to find that one of its current iterations has come to be known internationally as "the Vancouver model." Both German and Maloney, as well as Canadian news media, have tied this model to organized crime, Vancouver's fentanyl crisis, and artificially inflated real estate prices.

In his report, German describes the Vancouver model as a repeating cycle. It involves Chinese citizens who face restrictions on transferring assets out of China wanting to transfer some of their wealth by taking cash loans from private lenders in the Lower Mainland. The borrowers repay the loans not in Vancouver, but in China, where they transfer local assets to associates of the lender. These associates often use the Chinese funds to manufacture illegal drugs, which they then ship to Vancouver and elsewhere. The sale of illegal drugs provides the Vancouver-based lender with more cash to fund further loans.

PRACTICE ADVICE, *by Barbara Buchanan, QC, Practice Advisor*

Rule amendments enhance Law Society's anti-money laundering measures

IN JULY, THE Law Society amended the trust account and cash transaction rules, as well as the client identification and verification rules. The changes, which are based on the Federation of Law Societies' model rules, are part of the Law Society's ongoing commitment to combat money laundering.

In this article, I focus on three specific topics:

1. client identification and verification – information required as to a client's source of money (Rule 3-102(1));
2. cryptocurrency – risks of money laundering and dishonest activity (Rule 3-99(1.1));
3. cash transactions – when refunds must be made in cash (Rule 3-59(5)).

For an overview of the trust account and client identification and verification rule changes, and the rules, refer to the following information:

Part 3, Division 7 – Trust Accounts and Other Client Property

A Notice to the Profession summarizing the changes to Part 3, Division 7, Trust Accounts and Other Client Property, was emailed to lawyers in July. For a more detailed explanation, see the Practice Resource Highlights of Changes to Trust Account and Cash Rules, July 2019. For more on the cash rules and anti-money laundering, read "Anti-money laundering cash transaction rule essentials" in the Summer 2019 *Benchers' Bulletin* (pages 10 to 14).

The Law Society's consultation with the profession on proposed changes to the fiduciary property rule (Rule 3-55(6)) that would prohibit "fiduciary property" (defined in Rule 1) from being deposited into a trust account when no legal services are provided has concluded. The Benchers are expected to consider the fiduciary property rules in light of new Rule 3-58.1 (Trust account only for legal services).

Part 3, Division 11 – Client Identification and Verification

The rule changes to Part 3, Division 11, Client Identification and Verification, ***will take effect on January 1, 2020*** (E-Brief: July 2019). The changes introduce more stringent requirements to verify a client's identity, provide more options for how to confirm the client's identity and require lawyers to obtain additional information about a client's source of "money" (see the topic "Source of money" below), as well as monitoring on a periodic basis the professional business relationship with the client and keeping records of the monitoring measures taken and information obtained. Rule 3-102(1) changes the requirement that a lawyer "must take reasonable steps" to verify the client's identity to a requirement that the lawyer "must verify" the client's identity. If a government-issued identification document is used in the physical presence of the client to verify the client's identity, the document must contain the individual's name and photograph in order to compare the name and photograph with the individual (Rule 3-102(2)(a)(i)). Under the existing rule, a photograph is not specifically required. The identity document must be valid, original and current; an electronic image of the document does not suffice. Notably, the exemptions from verification of a client's identity when a lawyer pays or receives money pursuant to the order of a court or other tribunal or as a settlement of any legal or administrative proceeding that has been commenced, are eliminated (Rule 3-101(b)(iv)).

See also the Federation's website for its "Guidance for the Legal Profession" and the model rules. Further resources and education will be available between now and the end of 2019.

SOURCE OF MONEY – CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS

The Law Society has strengthened Rule 3-102(1) to require that when a lawyer provides legal services in respect of a financial transaction, the lawyer must obtain from the client and record, with the applicable date, information about the client's "source of money." This requirement, effective January 1, 2020, is separate from the existing requirements in the accounting rules regarding the source and form of funds (more below on this distinction).

As of January 1, 2020, Rule 3-102(1) states:

> (1) When a lawyer provides legal services in respect of a financial transaction, the lawyer must
>
> (a) obtain from the client and record, with the applicable date, information about the source of money, and
>
> (b) verify the identity of the client using documents or information described in subrule (2).

The terms "money" and "financial transaction" are defined in Rule 3-98:

> **"money"** includes cash, currency, securities, negotiable instruments or other financial instruments, in any form, that indicate a person's title or right to or interest in them, and electronic transfer of deposits at financial institutions.
>
> **"financial transaction"** means the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money.

Note that a "financial transaction" can occur without "money" being deposited into a lawyer's trust account.

Below are questions to consider in relation to the source-of-money requirements.

1. Why must a lawyer obtain information about a client's source of money when verifying the client's identity?

A client's source of money is relevant to understanding the risk of acting for the client with respect to a "financial transaction." For example, more risk of money laundering or other illegal activity is generally associated with cash and cryptocurrency (also referred to as virtual currency

or digital currency) than payment by credit card. Also, if the client's source of money is coming from a third party unrelated to the transaction or from outside of Canada, this may also be an indication of increased risk.

2. What does "source of money" mean in client verification?

For the purposes of client verification Rule 3-102(1)(a), a client's source of money is directly related to the economic origin of the money. The money is most likely to be received from a bank account regardless of the form in which it is received (e.g., cheque, e-transfer). However, in addition to a bank account or other source (e.g., cash), the client's source of money means the name of the payer and the activity or action that generated the client's money for the financial transaction for which the lawyer is providing legal services. Some examples are the client's salary, a bank loan, a share sale, the sale of an insurance policy, payment from a trust fund and payment from a third party.

At a minimum, the lawyer must record for the purposes of Rule 3-102(1)(a):

- information obtained from the client about the activity or action that generated the client's money (e.g., salary, bank loan, inheritance, court order, sale agreement, settlement funds);
- the economic origin of the money (e.g., credit union account, bank account, Canada Post money order, credit card charge, cash);
- the date the money was received; and
- the source from whom the money was received (i.e., the payer: the client or name and relationship of the source to the client).

It would be prudent to make copies of any supporting documents (e.g., bank statement, court order, sale agreement) obtained regarding the source of money and retain them. Of course, you are required to obtain and retain information and documents used for verification of a client's identity (Rule 3-107).

3. When should a lawyer obtain information about a client's source of wealth?

A client's source of wealth is related to a client's source of money. In some circumstances, a lawyer should engage in enhanced due diligence and make inquiries about a client's source of wealth. A client's source of money and source of wealth may be the same for some clients (e.g., a teacher's salary and savings from teaching) or different (e.g., a teacher with a modest salary who has money from an inheritance). If a teacher is purchasing a $6 million home, such an amount is not commensurate with normal spending for a teacher. Another example is that a client may have a cashier's salary but drive a $250,000 car and want the lawyer to act on a purchase of a $5 million home. A prudent lawyer would look to obtain satisfactory information about the client's source of wealth.

4. What should a lawyer do if the client has no satisfactory explanation regarding the client's source of money in respect of the financial transaction?

If there is no satisfactory explanation as to the client's source of money (including source of wealth) for the financial transaction for which you would provide legal services, do not act for the client. If you are already acting, you may have a duty to withdraw at any time. For example, while monitoring your professional relationship with the client, you may determine that the client's information in respect of the source of money used in the financial transaction for the retainer is untrue and there is a risk that you could assist in or encourage illegal conduct if you were to continue. See Rules 3-109 and 3-110 and *BC Code* rule 3.2-7 and commentary.

5. Do the accounting rules have additional obligations for recording the source of money?

Yes. Take careful note that lawyers have additional obligations in the accounting rules, apart from the client identification and verification rules, although there is some overlap. The term "money" isn't used in the accounting rules; other defined terms are used for accounting purposes. See Law Society Rules 1 (definition of "funds," "general funds" and "trust funds"), 3-53 (definition of "cash"), 3-59 (cash transactions), 3-68(a) (source and form of funds), 3-69 (source of funds) and 3-70 (record of cash transactions).

For example, Rule 3-68(a) requires that a lawyer maintain at least the following for trust account records in a book of entry or data source:

Services for lawyers

Law Society Practice Advisors

Barbara Buchanan, QC
Brian Evans
Claire Marchant
Sarah Sharp
Edith Szilagyi

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

All communications with Law Society practice advisors are strictly confidential, except in cases of trust fund shortages.

◆

LifeWorks – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
Tel: 1.888.307.0590.

◆

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers.
Tel: 604.685.2171 or 1.888.685.2171.

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, law students and support staff of legal employers.
Contact Equity Ombudsperson **Claire Marchant** at tel: 604.605.5303 or email: equity@lsbc.org.

- the date and amount of receipt or disbursement of all funds;
- the source and form of funds received;
- the identity of the client on whose behalf trust funds are received or disbursed;
- the cheque or voucher number for each payment out of trust;
- the name of each recipient of money out of trust.

For the source of funds, a lawyer must record the payer's name (the client's name or a third party's name). For the form of funds, a lawyer must record whether the funds were received by bank draft, cheque, wire, cash, e-transfer or electronic funds transfer.

CRYPTOCURRENCY RISKS

Cryptocurrency — also known as virtual currency, digital currency or electronic currency — is becoming more and more common in the consumer marketplace. For instance, just last weekend I was in a rural BC village where a small health food shop accepted bitcoin for purchases. An online search reveals that 15 cities in BC have bitcoin and other cryptocurrency ATMs.

When it comes to legal services, some clients may expect to pay your professional account with bitcoin or ethereum. They may also want to use cryptocurrency to finance real property conveyances or other transactions, or they may ask you to advise them on cryptocurrency offerings and investment schemes (e.g., initial coin offerings, initial token offerings). Cryptocurrency transactions in a legal practice come with increased risks and should be a red flag for lawyers to be on high alert. Unfortunately, some BC lawyers' introduction to cryptocurrency has been the unfortunate experience of being hit with ransomware attacks, with the criminal demanding bitcoin to restore the firm's computer system.

If a client wants to engage in a cryptocurrency transaction, consider your competency and be aware of the increased risks of money laundering and dishonest activity. Use a high degree of scrutiny in relation to the client, any third party involved, the source of the currency, the proposed transactions and your resources. Cryptocurrency exchanges (platforms that facilitate the transfer of cryptocurrency) operate in many countries, often with little or no regulatory oversight, which makes them attractive for criminals, including organized crime and terrorist organizations that want to move currency with relative anonymity. Cryptocurrency transactions often involve large amounts and come with significant security and other risks. Similar to cash, it can be difficult to discern the source of the currency. Rule 3-99(1.1), effective January 1, 2020, states:

> (1.1) The requirements of this division are in keeping with a lawyer's obligation to know his or her client, understand the client's financial dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

Assuming you are competent in this sector, assess the risks of acting for the client and make sure you comply with the anti-money laundering rules (Law Society Rules, Part 3, Divisions 7 and 11, and *BC Code* rules 3.2-7 and 3.2-8). Maintain an awareness of the Law Society's Discipline Advisories and Fraud Alerts. In addition to cryptocurrency risks, consider other red flags such as:

- client does not have a bank account and is unable to obtain banking privileges with a financial institution;
- client wants to pay legal fees in cryptocurrency in an amount out of proportion with the legal services involved;
- new client outside of Canada;
- few legal services required;
- size of transaction doesn't fit with the client's occupation or source of wealth;
- third parties involved with no reasonable connection to the client;
- no reasonable business plan in place;
- known scammers involved.

Record your inquiries and your findings and, if the results are not satisfactory, do not act or provide any further services.

Even if the client is reputable, recognize your limitations. Cryptocurrency presents novel and complex issues. Lawyers must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer. Before acting, review *BC Code* section 3.1 and consider whether you have the relevant knowledge and skills to ask the appropriate questions and carry out the required due diligence and legal services. The cryptocurrency sector is evolving and complex. For example, below is a short list of things to consider. There are many more.

- Are you aware of the regulatory requirements and laws that may apply? Parties may reside in jurisdictions outside of Canada, and the applicable laws may be unclear.
- Do you have sufficient substantive knowledge regarding cryptocurrency transactions?
- Do Canadian securities laws apply?
- Are you aware of the tax implications of the transaction? Has the client received accounting and tax advice from a knowledgeable person?
- Is the proposed cryptocurrency exchange regulated? Does it have policies and procedures for anti-money laundering and anti-terrorist financing, verification of identity and record-keeping? What standards and insurance are in place to safeguard a client's cryptocurrency?
- How will you value the cryptocurrency and eliminate or mitigate the risk resulting from currency volatility?
- How will you protect your client from access, custody and liquidity issues? The cryptocurrency sector received significant scrutiny after the death of Quadriga CEO Gerald Cotten and the ensuing difficulties accessing its holdings.
- Are all of the parties represented by lawyers? If you are acting for a start-up and unrepresented investors are involved, note Code rule 7.2-9.

Client paying your account with cryptocurrency

Currently there is no Law Society Rule that specifically prohibits lawyers from receiving cryptocurrency for payment of legal services. However, you should view requests to accept cryptocurrency with skepticism and be on guard against engaging in any activity that you know, or ought to know, assists in or encourages any dishonesty, crime or fraud (Code rules 3.2-7 and 3.2-8, and Law Society Rule 3-109

and, effective January 1, 2020, Rule 3-110. After performing your due diligence and determining that you can accept payment, consider how you will account for changes in value due to the volatility of cryptocurrency. Lawyers have a duty to ensure that their fees are fair and reasonable. The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees (Code section 3.6). Use a reputable cryptocurrency exchange when you convert the cryptocurrency to fiat currency. Report the amount to the client and, if you receive a higher amount than your account, the excess must be deposited into trust and then refunded to the client if you are not providing more legal services (Rule 3-58.1). Lawyers are required to retain supporting documents to confirm the cryptocurrency transaction and provide a clear audit trail. When required under the *Legal Profession Act* or the Law Society Rules, a lawyer must, on demand, promptly produce the records (Rule 10-3). The Rules do not permit cryptocurrency to be held as "trust funds" (Rule 1).

CASH TRANSACTIONS – WHEN REFUNDS MUST BE MADE IN CASH

The cash rules are in Part 3, Division 7 – Trust Accounts and Other Client Property. A lawyer or law firm may receive or accept cash in an aggregate amount greater than $7,500 in respect of a client matter for "professional fees," "disbursements" or "expenses" (defined in Rule 3-53) in connection with the provision of legal services by the lawyer or law firm (Rule 3-59(4)). Read Rule 3-59 and the examples in the table below to determine when a refund must be made in cash. Any refund of cash received or accepted in an aggregate amount greater than $7,500 must be made in cash. Rule 3-59(5) states:

> (5) A lawyer or law firm that receives or accepts cash in an aggregate amount greater than $7,500 under subrule (4) [in respect of a client matter for professional fees, disbursements or expenses] must make any refund out of such money in cash.

Records of cash transactions must be kept in accordance with Rule 3-70. Keep in mind that other rules exist related to cash that are not dealt with in the examples. If you have questions about the accounting rules or refunding cash, contact a trust auditor at trustaccounting@lsbc.org or 604.697.5810.

FURTHER INFORMATION

You are welcome to contact Practice Advisor Barbara Buchanan, QC (604.697.5816 or bbuchanan@lsbc.org) regarding the content of this article. Contact an auditor for trust account and general account questions (trustaccounting@lsbc.org or 604.697.5810).❖

Scenarios for cash or cheque refunds – as of July 12, 2019

Scenario	How to refund the balance of the retainer
#1 – Lawyer receives greater than $7,500 cash in a lump sum • Lawyer requests an $8,000 retainer for legal services. • Client provides an $8,000 cash retainer. • Lawyer bills the client $5,000. • Lawyer must refund $3,000.	The lawyer must refund the $3,000 in cash because the lawyer received an amount greater than $7,500 cash.
#2 – Lawyer receives greater than $7,500 cash in the aggregate • Lawyer requests a $5,000 retainer for legal services. • Client provides a $5,000 cash retainer. • Lawyer bills the client $5,000. • Lawyer requests a further $5,000 retainer. • Client provides a $3,000 cash retainer. • Client provided $8,000 in cash in the aggregate. • Lawyer bills the client $1,000. • Lawyer must refund $2,000.	The lawyer must refund the $2,000 in cash because the lawyer received an amount greater than $7,500 cash in the aggregate.
#3 – Lawyer receives less than $7,500 cash • Lawyer requests a $7,000 retainer for legal services. • Client provides a $7,000 cash retainer. • Lawyer bills the client $4,000. • Lawyer must refund $3,000.	The lawyer is not required to provide a cash refund because the client provided less than $7,500 in cash. The lawyer may make the refund by trust cheque or by electronic transfer. The lawyer may not make the refund in cash because the lawyer is not required to do so (Rule 3-64(4)(d)).
#4 – Lawyer receives a combination of cash and cheque • Lawyer requests a $10,000 retainer for legal services. • Client provides an $8,000 cash retainer and a $2,000 cheque. • Lawyer bills the client $7,000. • Lawyer must refund $3,000.	The lawyer must refund the $3,000 in cash because the lawyer received an amount greater than $7,500 cash.

Conduct reviews

PUBLICATION OF CONDUCT review summaries is intended to assist lawyers by providing information about ethical and conduct issues that may result in complaints and discipline.

BREACH OF CONFIDENTIALITY

A lawyer filed an affidavit with supporting materials that contained information relating to a Law Society investigation into a complaint. The affidavit was filed in support of a special costs application against the complainants. Law Society Rule 3-3 provides that no one is permitted to disclose any records that form part of a complaint, and section 87 of the *Legal Profession Act* states that Law Society correspondence is not admissible as evidence in any proceeding without the consent of the executive director. The lawyer acknowledged that his conduct was inappropriate, and he explained that the confidentiality requirements simply did not register with him when he filed the affidavit. (CR 2019-23)

FAILURE TO MEET FINANCIAL OBLIGATIONS

Rule 7.1-2 of the *Code of Professional Conduct for British Columbia* requires a lawyer to promptly meet financial obligations in relation to his or her practice, including the remittance of GST, PST and employment source deductions. Lawyers must also remit a trust administration fee (TAF) to the Law Society in accordance with Law Society Rules 2-110(3) and 3-49(e). In similar but separate instances, conduct review subcommittees met with lawyers who did not promptly meet their financial obligations by:

- failing to remit GST, PST and payroll source deductions over the course of approximately three years. The lawyer acknowledged that he did not pay enough attention to the administrative side of his practice and that he did not have adequate professional bookkeeping assistance at the time. The lawyer hired a bookkeeper who rectified the errors. He has also brought his tax filings and remittances up to date and paid all outstanding monies owed. (CR 2019-24)
- failing to remit GST and payroll source deductions to the Canada Revenue Agency and the TAF to the Law Society. The GST and payroll source deductions were collected, but instead of the funds being remitted to the CRA, they were placed in the firm's general account and used to pay commercial debts. The lawyer reported the GST and payroll source deduction arrears to the Law Society in the firm's trust report every year from 2012 to 2017. The lawyer and the firm have hired a bookkeeper to do monthly reconciliations and tax payments and pay all outstanding debts. The partnership set up a savings account in which to place the estimated tax and payroll deduction payments. (CR 2019-25)

JURICERT PASSWORD

A compliance audit revealed that a lawyer disclosed his Juricert password to his paralegal and permitted the paralegal to affix his digital signature on documents electronically filed in the land title office, including property transfer tax returns, contrary to Law Society Rule 3-96.1 and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*. The lawyer admitted that he had been inattentive to Law Society communications about the requirements and restrictions around using Juricert passwords. He has made the appropriate changes to his practice to ensure compliance and has agreed to read all future Law Society publications. (CR 2019-26)

CLIENT ID AND VERIFICATION

A lawyer failed to use an agent to verify the identity of his client in a non-face-to-face transaction where the client was outside of Canada, contrary to Law Society Rule 3-104, and failed to retain copies of documents used to verify the identity of his clients, contrary to Rule 3-107. The lawyer acknowledged his breach of the client identification and verification rules and committed to using the Law Society's checklists and agency agreements in the future. (CR 2019-27)

BREACH OF COURT ORDER

While representing a husband in a family law action, a lawyer breached a court order by facilitating a transfer of property from the husband to his brother to settle a debt obligation, contrary to rules 2.1-3 and 2.2-1 of the *Code of Professional Conduct for British Columbia*. The court ordered that neither party encumber or sell any assets unless by written agreement of the parties or by a further restraining order. Despite having represented the husband at the application at which the restraining order was made, the lawyer had forgotten about the terms of the restraining order at the time of the property transfer. He acknowledged the seriousness of his conduct and has taken steps to add reminders to his files, including noting the existence and terms of any orders on sticky notes on his pleadings binders and placing copies of orders on the left-hand side of the correspondence file for ease of reference. (CR 2019-28)

ACTING AGAINST A FORMER CLIENT

A lawyer acted against a former client without the former client's consent, though the lawyer had relevant confidential information from the former representation. A conduct review subcommittee informed the lawyer that rule 3.4-10 of the *Code of Professional Conduct for British Columbia* prohibits a lawyer from acting against a former client if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client. The lawyer committed to conducting routine check for conflicts that may exist from previous representation. (CR 2019-29)

QUALITY OF SERVICE

While acting in a real estate conveyance, a lawyer failed to provide the quality of service that is expected of a competent lawyer in a similar situation, contrary to rules 3.2-1 and 3.2-2 of the *Code of Professional Conduct for British Columbia*. He had failed to obtain, confirm and record his

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- William Henry Lim
- Roy Swartzberg
- Gerhardus Albertus Pyper
- Donald Franklin Gurney
- Wade Cameron MacGregor
- Steven Neil Mansfield
- William Lorne MacDonald

For the full text of discipline decisions, visit Hearing Schedules and Decisions on the Law Society website.

WILLIAM HENRY LIM

Vancouver, BC

Called to the bar: July 13, 1977

Written materials: April 2, 2019

Panel: Sarah Westwood, chair, David Layton, QC and Guangbin Yan

Decision issued: May 30, 2019 (2019 LSBC 19)

Counsel: Kathleen Bradley for the Law Society; Gerald Cuttler, QC for William Henry Lim

AGREED FACTS

A colleague at William Henry Lim's firm was representing a potential lender who had been approached by a group of borrowers for a loan of $2.5 million. Two of the borrowers approached Lim with a proposal for the lender. The lender sought appraisals for the properties to be put up as security. The borrowers said that would take too long and asked Lim if he would lend them the money. Lim agreed to lend the money, not as a lawyer but in his private capacity as director of a corporation. The terms would be those previously proposed to the prospective lender, including repayment of the loan amount plus a $600,000 bonus within three months, and accrual of interest at four per cent per month if payment was not made within three months.

Lim asked an associate at his firm to draw up a loan agreement, but did not specify whether the four per cent interest was compound or simple, nor whether it applied to the amount of the loan only, or to the amount of the loan plus the $600,000 bonus. The document drawn up by the associate specified that interest was to be calculated monthly and compounded monthly. Lim also drafted a promissory note referring to $2.5 million as the principal sum, specifying that interest of four per cent of the principal sum would be charged per month, calculated monthly and compounded monthly.

Four per cent compound interest per month on a $2.5 million loan produces an annual effective rate of 60.1 per cent. Section 347 of the *Criminal Code* of Canada sets the threshold for a "criminal rate" of interest at 60 per cent per year.

When the borrowers did not repay the loan by the three-month maturity date, Lim hired other counsel to initiate foreclosure proceedings. When the borrowers still did not pay, Lim took the matter to trial. The trial judge found that Lim intended the interest to be compounded and therefore charged at a criminal rate. The judge ordered that the borrowers repay Lim the $2.5 million that had been advanced to them, without interest.

Investigation by the Law Society revealed information not put before the trial judge that indicated that Lim had not intended to charge a criminal rate of interest.

ADMISSION AND DETERMINATION

Lim admitted to the Law Society that, in his capacity as director of a corporation, he caused the corporation to enter into a loan agreement he ought to have known provided for interest at a criminal rate and that that conduct constitutes conduct unbecoming a lawyer. Lim maintained, however, that charging a criminal rate of interest was not his intent and that the problematic conduct resulted from a lack of attention during a rushed transaction.

The hearing panel accepted Lim's admission that his conduct constituted conduct unbecoming a lawyer and found there was no evidence that Lim intended to charge the borrowers a criminal rate of interest.

DISCIPLINARY ACTION

The panel ordered that Lim pay:

1. a fine of $8,000; and
2. costs of $1,000.

ROY SWARTZBERG

Coquitlam, BC

Called to the bar: November 13, 1998

Admission accepted: June 5, 2019

Counsel: Alison Kirby for the Law Society; Henry Wood, QC for Roy Swartzberg

Former lawyer Roy Swartzberg admitted that he misled four clients as to the status of their actions and in two instances fabricated court documents and misled other counsel about the status of the client's actions. He also admitted that he failed to provide those same four clients with the quality of service expected of a competent lawyer. Finally, Swartzberg admitted that in one instance he lent money to his client without ensuring that she received independent legal advice, and that he accepted a gift from another client without ensuring she had received independent legal advice.

The Discipline Committee accepted Swartzberg's admission of professional misconduct on the condition that he does not practise law or apply to be a member of the Law Society prior to June 5, 2026. Swartzberg also agreed not to directly or indirectly engage in the practice of law in BC, not to apply for readmission in any other law society prior to June 5, 2026 without first advising in writing the Law Society of BC, and not to work in any capacity whatsoever for any lawyer or law firm in BC without obtaining the prior written consent of the Discipline Committee.

Should Swartzberg apply for reinstatement in 2026, a credentials hearing must be held to consider his good character and fitness to practise law, and his professional conduct record would be considered at that time.

GERHARDUS ALBERTUS PYPER

Surrey, BC

Called to the bar: December 9, 2002

Ceased membership: January 29, 2015

Discipline hearing: July 31, 2018 and May 1, 2019

Panel: Joost Blom, QC, chair, and Robert Smith

Decisions issued: September 25, 2018 (2018 LSBC 28) and June 14, 2019 (2019 LSBC 21)

Counsel: Kieron Grady for the Law Society; no one appearing on behalf of Gerhardus Albertus Pyper

PRELIMINARY MATTERS

Before the hearing panel heard evidence on the merits of the allegations in the citation, Gerhardus Albertus Pyper sought an order that the panel lacked jurisdiction to conduct the hearing, that the allegations set out in the citation be dismissed or stayed, that the Law Society as an institution was biased, or other relief as the panel deemed just.

Pyper had made a similar application in two prior discipline proceedings. As part of its decision, the hearing panel in the first of those proceedings dismissed the application. Pyper appealed that decision to the BC Court of Appeal, and the court dismissed that appeal. The hearing panel found that Pyper had made a full argument for his application, or one essentially similar to it, before the first panel, and was unable to persuade the Court of Appeal that that panel's decision was unreasonable. The panel saw no unfairness in holding that he could not reopen the same issues before this panel.

The panel held that all the elements of issue estoppel were present and dismissed the preliminary application (2017 LSBC 27).

About a month before the hearing, Pyper advised the hearing administrator that he would not "fly back to Canada" to attend the hearing. The panel accepted proof that Pyper had been properly notified of the hearing date and concluded that it was in the public interest to proceed in his absence.

Pyper applied for dismissal or a stay of the citation on the grounds of unreasonable delay. The panel found that there were no valid grounds for a dismissal or stay on the basis of either abuse of process or prejudice to Pyper. The panel found that Pyper was himself responsible for most of the delay, and there was no evidence of prejudice caused by delay.

FACTS

In August 2011 a client retained Pyper to commence a civil action on his behalf, claiming that he had been assaulted at a soccer game. The alleged assailant was subsequently charged criminally with the assault.

Pyper filed a notice of civil claim with the registry in November 2011, and the following month he was advised that the process server had been unsuccessful in serving the notice.

By July 2012 nothing had happened on the file, and Pyper sent his client a letter requesting permission to hire a private investigator to serve the notice of claim. The client did not receive the letter before the notice of civil claim expired in November 2012.

In February 2013 the client met with Pyper, advised Pyper that the criminal trial was scheduled for July that year and said he wanted to proceed with the civil claim. Pyper's assistant attended the trial and served the alleged assailant with the notice of civil claim, even though the time for serving the notice expired and the two-year limitation period for the claim had expired.

The alleged assailant was acquitted at trial for lack of proof that he had assaulted Pyper's client.

In July 2013 another lawyer notified Pyper that the alleged assailant had retained the other lawyer with respect to the civil claim. The other lawyer asked Pyper if there had been an order renewing the time of service for the notice of civil claim and, if not, whether Pyper intended to seek such an order.

In August 2013 Pyper improperly applied for and obtained default judgment against the alleged assailant of his client, when the limitation period for the claim had already expired.

In November 2013 a Supreme Court of BC justice declined to hear Pyper on an application to set aside the default judgment and renew the notice of civil claim on the basis that it was not proper for Pyper to appear since he was responsible for the problem.

In February 2014 a third lawyer advised Pyper that Pyper's client had retained the lawyer to pursue the civil claim. The other lawyer said he understood that a missed limitation period had extinguished the client's claim and requested Pyper's files concerning the client. In April, on the new lawyer's application, the default judgment was set aside and the notice of civil claim was renewed for six months. The new lawyer advised the client that chances of success in the civil claim were fifty-fifty, at best. The new lawyer sent counsel for the alleged assailant an offer of settlement and notice of a two-day trial. The alleged assailant did not respond. The client decided he did not have the financial resources to pursue the matter further.

DETERMINATION

The hearing panel found that Pyper had failed to serve his client in a manner that would be expected of a competent lawyer. Pyper should have been aware of the expiry of the notice of civil claim and, since it was Pyper's responsibility that the notice had expired, he was in a conflict between his duty to the client and his own interest in minimizing his responsibility for the notice not having been served within one year. He had a duty to recommend that the client seek independent legal advice about the errors he had made in handling the client's claim. He failed to do so for more than a year.

The panel determined that Pyper's actions constituted both professional misconduct and, in the case of failing to provide adequate service, incompetent performance of duties.

DISCIPLINARY ACTION

Pyper did not attend the hearings on facts and determination and on disciplinary action, nor did anyone appear on his behalf. The panel determined that Pyper had been served with notice of the hearing date in accordance with Law Society Rules.

The Law Society sought a finding of ungovernability against Pyper and submitted that, if such a finding were made, disbarment was the appropriate disciplinary action.

The hearing panel considered Pyper's professional conduct record. In March 2014 the Law Society placed a number of restrictions on Pyper's practice, and in May 2014 Pyper was suspended primarily for failing to eliminate shortages in his trust accounts. In January 2016 a hearing panel found that Pyper had committed professional misconduct by practising law while suspended (2016 LSBC 01). Pyper appealed the decision to the BC Court of Appeal, which dismissed the appeal in March 2017. In October 2017 the hearing panel imposed a two-month suspension which, given that Pyper was not a member of the Law Society at the time, would commence if and when he was readmitted to the Law Society (2017 LSBC 35). The Law Society sought, and in July 2017 was granted, an injunction from the Supreme Court of BC prohibiting Pyper from practising law. In March 2018, a hearing panel found that Pyper had committed professional misconduct by failing to respond to several communications (2018 LSBC 10), and in January 2019 imposed a suspension of three months to commence immediately following the two-month suspension ordered in 2017 (2019 LSBC 01).

The panel found that Pyper was ungovernable, and considered that finding that a lawyer is ungovernable is inconsistent with the lawyer's continuing in practice or, in the case of a former lawyer, having a right to return to practice, and that, in such cases, disbarment is the only logical response.

The panel ordered that Pyper:

1. be disbarred; and
2. pay costs of $14,027.42.

DONALD FRANKLIN GURNEY

West Vancouver, BC

Called to the bar: May 15, 1968

Ceased membership: January 1, 2018

Written submissions: May 2, 2019

President's designate: Jeff Campbell, QC

Decision issued: July 5, 2019 (2019 LSBC 23)

Counsel: Sarah Conroy for the Law Society; no one appearing on behalf of Donald Franklin Gurney

BACKGROUND

A hearing panel concluded that Donald Franklin Gurney had committed professional misconduct by using his trust account to receive and disburse almost $26 million on behalf of a client without making reasonable inquiries about the circumstances of the transaction. The hearing panel ordered that Gurney be suspended for six months, pay $25,845 as disgorgement of the legal fees that he had received and comply with certain trust accounting conditions upon his return to practice (facts and determination: 2017 LSBC 15; disciplinary action: 2017 LSBC 32; Winter 2017 discipline digest).

Gurney filed an application for a review of the findings of facts and determination and disciplinary action, and the Law Society subsequently applied for an order that a review be dismissed on the basis that no steps had been taken to proceed with the review for more than six months.

DECISION ON APPLICATION TO DISMISS REVIEW

Gurney was required to file a review record within 60 days of filing the notice of review. In the 18 months after filing the notice, Gurney took no steps to advance the review. The Law Society's application to dismiss the review was granted.

WADE CAMERON MACGREGOR

Terrace, BC

Called to the bar: May 18, 1990

Discipline hearing: September 24, 2018 and March 8, 2019

Panel: Steven McKoen, QC, chair, John Lane and Lindsay R. LeBlanc

Decisions issued: December 27, 2018 (2018 LSBC 39) and July 22, 2019 (2019 LSBC 26)

Counsel: Sarah Conroy and Tara McPhail for the Law Society; Wade Cameron MacGregor on his own behalf

FACTS

Wade Cameron MacGregor's client had entered into a separation agreement stipulating that the client would pay his former domestic partner $1,913 in support per month, payable in biweekly instalments. After entering into the agreement, the client commenced proceedings in both the Provincial and Supreme Courts.

The client notified MacGregor that he was experiencing financial hardship. MacGregor sent a letter to the former partner's counsel in the Provincial Court action, proposing that the support payments be reduced by $200 a pay period and that the former partner contribute to expenses incurred for visiting their children. MacGregor found that the opposing counsel's office was closed for approximately 11 days. Upon returning, opposing counsel told MacGregor that he would have to file an application to vary the separation agreement.

MacGregor tried to contact opposing counsel in the Supreme Court action and found that that counsel was away for approximately two weeks. MacGregor advised his client that, given the delays caused by the two lawyers being away, the client should withhold $200 from each spousal support payment until MacGregor and the client could argue their case in court. The client followed MacGregor's advice. The client informed the former partner, and MacGregor informed her counsel of the advice and their intention to seek a variation of the separation agreement. The client's former partner complained to the Law Society.

The Supreme Court ordered that the spousal support payments should continue in the amount specified by the separation agreement and that MacGregor's client pay arrears and interest.

DETERMINATION

The panel found that MacGregor, knowing that the spousal support provisions of the separation agreement were enforceable as if they were a court order and having advised his client of the same, nonetheless counselled his client to violate those terms. The panel found this to be a breach of the Law Society Rules and the *Code of Professional Conduct for British Columbia*, and to constitute professional misconduct.

DISCIPLINARY ACTION

In determining suitable disciplinary action, the panel considered that it is the duty of all lawyers in BC to uphold the orders of our courts and not counsel clients to intentionally breach those orders. However, it found that MacGregor did not deliberately and knowingly breach his obligations, but rather had an honest but mistaken belief about his professional obligations respecting separation agreements that are enforceable as court orders that resulted in professional misconduct by counselling his client to withhold support payments in these circumstances. The panel also considered a number of factors, including the lack of guidance from precedent discipline cases, the need to recognize the public interest in the enhanced enforceability of separation agreements, the effect on the person to whom payments were owed under the separation agreement and MacGregor's past conduct record, as well as his forthright and transparent conduct in this matter.

The hearing panel ordered that MacGregor:

1. be suspended from the practice of law for 15 days; and
2. pay costs of $6,954.73.

MacGregor has applied for a review of the hearing panel's decisions.

STEVEN NEIL MANSFIELD

Vancouver, BC
Called to the bar: May 14, 1993
Written materials: May 9, 2019
Panel: Jeff Campbell, QC, chair, Carol Gibson and Sandra Weafer
Decision issued: July 22, 2019 (2019 LSBC 27)
Counsel: Kathleen Bradley for the Law Society; Steven Neil Mansfield on his own behalf

ADMISSION AND DETERMINATION

At the time of this hearing Steven Neil Mansfield had already been ordered disbarred by another hearing panel (2018 LSBC 30). The matter before this panel related to allegations not addressed in that prior decision. The Law Society and Mansfield agreed to proceed on written record without the need for an oral hearing.

Mansfield admitted to misappropriating trust funds belonging to several clients between 2013 and 2017 in order to pay gambling debts, and consented to an order of disbarment. The hearing panel accepted Mansfield's admission and consent.

DISCIPLINARY ACTION

The panel ordered that Mansfield be disbarred.

TRUST PROTECTION COVERAGE PAYMENT

In every profession, there are occasionally members who are dishonest. Although not all professions or industries protect victims of their dishonest members, the legal profession in BC has, since 1949, provided financial protection to members of the public whose money has been stolen by their lawyer. If a claim is made against a lawyer relating to the theft of money or other property, trust protection coverage (TPC) is available under Part B of the lawyer's insurance policy to reimburse the claimant, on the lawyer's behalf, for the amount of the loss.

Based on the circumstances described in allegations 1, 2 and 3 of *Law Society of BC* v. *Mansfield* (2019 LSBC 27), TPC claims were made against Mansfield and the Law Society has paid or expects to pay amounts totalling $189,709. Mansfield is obliged to reimburse the Law Society in full for the amount paid under TPC.

For more information on TPC, including what losses are eligible for payment, go to Compensation: Claims for Lawyer Theft.

WILLIAM LORNE MACDONALD

North Vancouver, BC
Called to the bar: February 19, 1999
Written materials: May 14, 2019
Panel: Dean Lawton, QC, chair, Carol Hickman, QC and Lance Ollenberger
Decision issued: July 24, 2019 (2019 LSBC 28)
Counsel: Angela Westmacott, QC for the Law Society; Carey Veinotte for William Lorne MacDonald

ADMISSION AND DETERMINATION

William Lorne MacDonald admitted that he misappropriated client trust funds totalling $1,977.20 for nine inactive client matters when he was not entitled to those funds. The amounts charged were based on residual amounts held in trust, not on amounts due for services or disbursements. No invoices were sent to the clients, and the clients did not consent to the charges. This conduct constitutes professional misconduct. MacDonald consented to a two-month suspension.

The panel found that MacDonald's conduct constituted professional misconduct and that a two-month suspension was reasonable in the circumstances.

DISCIPLINARY ACTION

The panel ordered that MacDonald:

1. be suspended for two months; and
2. pay costs of $1,000.

YVONNE YE WAH HSU

Surrey, BC
Called to the bar: May 28, 2004
Discipline hearing: July 26, 2019
Panel: Phil Riddell, QC, chair, Lindsay LeBlanc and Brendan Matthews
Decision issued: August 1, 2019 (2019 LSBC 29)
Counsel: William Smart, QC and Trevor Bant for the Law Society; William MacLeod, QC for Yvonne Ye Wah Hsu

AGREED FACTS

In 2009 a client retained Yvonne Ye Wah Hsu in connection with raising funds on behalf of CC Corp. Hsu drafted an offering summary, which the client then gave to prospective investors. Hsu did not take any steps to determine whether the client was registered under the *Securities Act* to sell securities.

Hsu began receiving offering summaries signed by various individuals and did not notice that someone was making changes from time to time to the document she had drafted. Hsu began receiving investor funds into her trust account, and she withdrew funds, which were paid to the client or to a company controlled by the client.

Hsu and the client came up with an investment structure according to which investors would not receive shares in CC Corp., but rather in a new company (NewCo), which would issue shares to investors as "security."

The client informed Hsu that CC Corp.'s CEO had been caught embezzling funds, that CROF Corp. company was going to carry on its business, and that he was now raising funds for CROF Corp. Hsu incorporated a second new company (NewCo2) to issue shares to investors as "security," and she revised the Form of Investment Agreement to refer to CROF Corp. and NewCo2.

While Hsu was away from the office on parental leave for approximately a year between 2011 and 2012, her firm continued to receive investor funds into trust and pay them to the client or to the company controlled by the client. During this time all document packages were prepared for investors by legal assistants with no supervision by a lawyer.

In May 2013 CC Corp. filed an assignment into bankruptcy. The client told Hsu he wanted to continue the project by asking investors for a 15 per cent top-up so that he could buy the company's assets out of bankruptcy.

Hsu incorporated a new company, EC Corp., to receive the "top-up" investments and attempt to buy CC Corp.'s assets out of bankruptcy. These funds were deposited into Hsu's firm's trust account and were subsequently paid out to the client or to the company controlled by the client.

In total, Hsu received approximately $12.5 million into her trust account from persons who intended to invest in CC Corp. or CROF Corp. and approximately $1.8 million from persons who intended to invest in EC Corp. No investors received any shares of CC Corp., CROF Corp. or EC Corp.

Hsu paid out from her trust account approximately $12.3 million to the company controlled by her client, $1.4 million to the client personally and $350,000 to CC Corp.

In December 2017 the BC Securities Commission held that the client, the company controlled by him, NewCo and NewCo2 had each committed fraud, and that the client had fraudulently misappropriated approximately $5 million from persons who intended to invest in CC Corp. or CROF Corp.

ADMISSION AND DETERMINATION

Hsu admitted to professional misconduct. In determining a suitable disciplinary action, the panel considered that Hsu had no previous discipline history and accepted that she was not aware of and did not intend to facilitate the fraud. The panel also took into consideration that Hsu admitted her misconduct, was cooperative with the investigation and agreed that securities was an area of specialty in which she was not competent to practise.

DISCIPLINARY ACTION

The panel ordered that Hsu:

1. be suspended for three months;
2. be restricted from practising in the area of securities law; and
3. pay costs of $1,000 plus taxable disbursements. ❖

Conduct reviews ... from page 18

client's instructions. He did not adequately explain a deficiencies clause or discuss other options though the agreement modified the contract in a manner that was contrary to his client's interests. He also did not keep his client reasonably informed of a delay in transferring title.

The lawyer acknowledged to the conduct review subcommittee that he should have taken notes and confirmed instructions in writing and that he should have advised his client about the delay in transferring title. He committed to seeking advice from senior practitioners when appropriate. The subcommittee recommended that the lawyer join Canadian Bar Association sections to keep up to date in emerging issues. (CR 2019-30) ❖

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